Ex parte MENSING.

CLAFLIN et al. v. SOUTH CAROLINA R. CO. et al.

(Circuit Court, D. South Carolina. April 12, 1893.)

EQUITY—PARTIES—INTERVENTION.

Where, in a suit in equity, an execution has issued, and a levy and sale have been made of certain lands, a third party, who claims to be the true owner, cannot intervene, for the purpose of moving to set aside the execution, when there is no privity of estate between him and the party against whom the execution has issued. His remedy is a bill to quiet title, or he may, in an action at law, plead the invalidity of the execution.

In Equity. Petition by Henry C. Mensing for leave to intervene in the suit of Calvin Claflin and others against the South Carolina Railroad Company and others. Denied.

C. B. Northrop, for the motion.
Mitchell & Smith, opposed.

SIMONTON, District Judge. The petitioner alleges that under an execution issuing out of the equity side of this court, in the main cause, certain lands of his were levied upon as property of the South Carolina Railroad Company, and attempted to be sold; that claiming under this sale, D. H. Chamberlain now seeks to dispossess him. He also alleges that many persons, complainants in the main cause, have died, and were dead when the alias execution under which the marshal proceeded was issued, whereby the said suit was practically suspended, awaiting the renewal of the suit, or the suggestions on the record, and that so the said execution was void. He also alleges that the execution was void because the time for the issuing of an alias execution under the law controlling this case had expired. He seeks to intervene in this case for the purpose of moving to set aside said execution, fearing that he cannot attack it in any other way. He has not alleged—in fact, he cannot allege—that he has any privity with any party to the main cause. He denies, himself, that he has any privity of estate; for he does not claim his land by or through the South Carolina Railroad Company, and on the contrary denies its title to or claim on this land. Under these circumstances, he cannot be made a party to the main case. The case cannot be res judicata as to him, or affect his rights at all, if his contention be true. He is an utter stranger to, and is not affected by, it. The only mode in which he could get into a court of equity on the grounds set up by him would be by bill to quiet title. But inasmuch as there is a suit pending between himself and D. H. Chamberlain, and about to be tried, attacking this title, and testing its validity, a bill to quiet title would not lie. Story, Eq. Jur. § 826. If, as he alleges, this execution is utterly void, he can, in his defense at law, avail himself of this, if the execution be offered in evidence as a link in the chain of plaintiff's title.

The petition is dismissed.

NORTH ALABAMA DEVELOPMENT CO., Limited, v. ORMAN.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1893.)

No. 101.

1. COVENANTS TO PAY ANOTHER'S DEBT—ACTION BY CREDITOR.
Where the grantee of land covenants that as part of the consideration he will pay certain notes given by his grantor for deferred payments when he purchased the land, the payee, under the laws of Alabama, may proceed at law against the covenantor; and his so proceeding is such an acceptance of the covenant as draws to him the exclusive right of action thereon. Affirming 53 Fed. Rep. 469.

2. SAME—REMOVAL TO FEDERAL COURT—JURISDICTION.
Where such proceeding, begun in the state court, is removed to the United States circuit court, it will proceed therein as an action at law, as it would have done in the state court, and the jurisdiction is not affected by stipulations between the parties.

3. SAME—CONSTRUCTION—NOTE SECURED BY MORTGAGE.
The grantee of land covenanted that as part of the consideration therefor he would pay certain notes made by the grantor. These notes recited that they were secured by mortgage on the land, and that in case of foreclosure the maker should be liable only to the extent of the proceeds of the sale, which proceeds should constitute a cancellation of the note. In the mortgage a power of sale was granted the mortgagee, the payee of the notes. *Held* that, since neither notes nor mortgage required a sale of the land upon default in payment, the covenantor was liable in an action at law for the face of the notes if not paid at maturity. Affirming 53 Fed. Rep. 469.

4. ATTACHMENT—GROUNDS—FOREIGN CORPORATION.
By the express provision of the Alabama Code, § 2940, an attachment may issue in an action against a foreign corporation which has property within the state. Affirming 53 Fed. Rep. 469.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by W. A. Orman against the North Alabama Development Company, Limited, of London, England, a corporation, originally brought in the circuit court of Franklin county, Ala., and thence removed into the United States circuit court, where a motion to dissolve an attachment issued by the state court was overruled, and judgment given for plaintiff. See 53 Fed. Rep. 469. Defendant brings error. Affirmed.

Roulhac & Nathan, for plaintiff in error.

W. I. Bullock and Milton Humes, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. Defendant in error brought his actions at law in a state court in Alabama on a certain covenant in a deed from one Parish and wife to the plaintiff in error, which covenant is in these words:

"And it is hereby covenanted and agreed by the said party of the second part, to and with the said party of the first part, that the said party of the second part will assume, and does hereby assume, the full and just payment at maturity of the two notes hereinbefore mentioned, given by the said party